No. 22343

In The

United States Court of Appeals

For The Ninth Circuit

Angus J. DePinto,
Appellant,

v.

Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram,
Appellees,

BRIEF OF APPELLEES,

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and Edwin B. Pegram

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GALLATIN COUNTY TRIBUNE
BOZEMAN, MONTANA

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I. Statement of the Case

For a complete statement of the case, the motion for Summary Judgment made by Defendant, Landoe on DePinto's cross-claim should be set forth. The motion was as follows: (Transcript 128)

"A. The matter of the cross-claim is res judicata for the reason that the trial court has previously dismissed the cross-claim, an appeal to the Circuit Court of Appeals did not reverse the trial court on this ground and for that reason the matter is res judicata.

B. By the substantive law of the State of Arizona, the matter is res judicata for reason that the cross-claimant Angus J. DePinto has been found liable for the negligence and a breach of fiduciary duty to the plaintiff by a jury, the Circuit Court of Appeals has affirmed the judgment, and under Arizona law there is no right of contribution or indemnification between joint tortfeasors, and therefore there is no genuine issue as to any material fact.

C. The cross-claim of defendant DePinto against defendant Landoe fails to state a claim upon which relief can be granted for the reason that under Arizona law there is no right of contribution or indemnification among joint tortfeasors."

The motion of Sabo and Pegram was identical and the memorandum on behalf of Landoe's motion was adopted by Sabo and Pegram. (Tr. 136)

The Court then made a memorandum order of summary judgment dismissing the cross-claim (Tr. 139-140) and likewise dismissed on Sabo and Pegram's motion. (Tr. 142) Judgment was entered accordingly.

II. Argument

Preliminary matters.

In the long and arduous trail of this case,

counsel for appellee recall the comment by one of the learned judges of the Circuit Court when he was appearing before that court on or about the third or fourth occasion, when the Judge said that he enjoyed seeing counsel but hoped that they might not return again on this same case. But such is not the luck of the court or counsel, and once again, we are here before this court on a different matter.

In Cause 18,245 in the U. S. Court of Appeals, Volume IV of the Transcript of Record, Page 1710, it is shown that motions were made by Landoe, Sabo and Pegram to dismiss the cross-claims of DePinto against these particular moving parties. The Trial Court stated on Page 1711 of this transcript, in granting the motion the following: (Tr. 130)

> "The cross claims of DePinto and Duhame are predicated on the contention that their liability, if any, is vicarious and secondary to that of the defendants against whom the crossclaims are asserted. The named defendants cite an Arizona case discussing primary and secondary tort liability and authorizing recovery of contribution or reimbursement to those held in the second category from those in the first category. Busy Bee Buffet v. Ferrell, 82 Ariz. 192; 310 P. 2d 817. Under the particular facts of this case neither DePinto nor Duhame qualifies as having only secondary liability as defined and applied in the cited decision. Both DePinto and Duhame are found and held to be primary joint tortfeasors and may not recover contribution under Arizona law. For these reasons the motion of defendants Sabo, Pegram and Landoe to dismiss the cross-claims of defendants DePinto and Duhame is hereby granted."

Subsequent to that time, trial was had against the appellant DePinto and the issues were limited to the matters that took place on or about October 18, 1957 in Phoenix, Arizona. (DePinto vs. Provident Security Life Insurance Company, 374 F.2d 37, 40.) We deem it important to point out to this Court, and as this Court has previously noted, that at the 4:00 p.m. meeting of the Board of Directors of United on October 18th, 1957, that appellant, DePinto, was present at the meeting, the minutes were expressly approved by him and signed by him. (Tr.52) At a meeting held subsequent to that time, at 4:15 p.m. on October 18th, DePinto was also present and the appellees, Frank I. Sabo and Edward B. Pegram, were not present, they being residents of Montana, and were actually in the State of Montana at that time. (Tr. 55). Although Sabo and Pegram were appointed to the Board of Directors of United Security, Landoe never was on the Board of Directors of United, and he likewise was absent from Arizona at all times when the complained of transactions took place. (Tr. 52-58)

Furthermore it is important to note that at no subsequent time did Landoe ever become a director of United and in the initial ruling by this Court, the Court held that liability, if any, of Landoe must be predicated upon that of negligence and not a breach of a fiduciary duty for the fact that he was never a member of the Board of Directors of United. This Court in DePinto vs. Provident Security Life Insurance Company, 323 F.2d 826, 836, said:

> "One ground for the judgment, applicable to all of the appellants, is gross negligence. Another ground, applicable to all appellants except Landoe, is breach of fiduciary duty.

Since the grounds for the motion for summary judgment were threefold, we shall argue these grounds in two parts--one on the question of the matter being res judicata, and secondly on the ground that the cross-claim failed to state a claim upon which relief can be granted for the reason that under the Arizona law there is no right of contribution or indemnification among joint tortfeasors. (Tr. 128).

A. Matter is Res Judicata

It may be conceded that since the Circuit Court did in its initial opinion, 323 F2d 826, at 838 state that there were certain other questions presented on the appeal that were not decided, and one was the cross-claim of DePinto against Landoe, Sabo and Pegram, that the absence of a ruling on this cross-claim would not make this issue of the claim res judicata. However, we respectfully submit that under substantive law of Arizona that it is res judicata.

It is universally recognized that in the absence of a statute, joint tortfeasors have no right of contribution between one another. This was established in Arizona in Blakely Oil vs. Crowder, 292 P2d 842. The facts are briefly that one Richmond brought an action against Blakely for damages for personal injuries suffered by him, and Blakely permitted a judgment to be entered against Blakely Oil. Thereafter, Blakely brought a claim against Crowder alleging that Crowder Cattle Company was negligent in permitting its cattle to strag upon a public highway, and alleged that this was the active, primary and efficient proximate cause of the injuries to Richmond. The cattle company filed a motion to dismiss the third party complaint, and contended that under provis-

ions of Section 21-446, 1952 Cum. Supp. A.C.A., 1939, the action was not maintainable. The Court, on page 843, considering Section 21-446 stated:

> "It will be seen from the above quotation, as amended, the right of a defendant to bring in a third-party defendant is limited to persons only who are secondarily liable to the original defendant and who are not primarily liable to the plaintiff in the original cause of action. If the third-party defendant is primarily liable to the original plaintiff he then becomes at most a joint tortfeasor with the third-party plaintiff and under such circumstances, according to all the authorities in the absence of statute, the original defendant, third-party plaintiff, may not maintain an action against him for contribution." (emphasis supplied)

The court then went on to consider the question of primary and secondary liability from Builders Supply Company vs. McCabe, 366 Pa. 322, 77 A.2d 368, 371, 24 ALR 2d 319. Primary and secondary liability will be considered more completely in the next portion of the Brief, but the court held that inasmuch as the defendant had permitted a judgment on the negligence aspect to go against him, that it was res judicata as far as his primary negligence was concerned, and there was no right of contribution. The court on this issue said on page 844:

> "In the case of concurrent or joint tortfeasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities

everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other. The universal rule is that when two or more contribute by their wrongdoing to the injury of another, the injured party may recover from all of them in a joint action or he may pursue any one of them and recover from him, in which case the latter is not entitled to indemnity from those who with him caused the injury.

The court further said:

"Applying this rule to the instant case and assuming for the purposes of this opinion, but not deciding the question, that the cattle company was negligent, it is clear to our minds that Blakely is not in a position to maintain a cause of action against the cattle company. It suffered a judgment to be rendered against it in the original cause of action in a large sum. The fact that a settlement of the cause of action was reached by stipulation of counsel for the respective parties prior to its submission to the jury makes the judgment none the less res judicata as the fact of negligence on the part of Blakely in proximately causing the collision and the consequent injury to plaintiff. A reading of the McCabe case will show that all of the authorities are in accord with this statement. The contention of counsel for Blakely therefore that because the case was not submitted to the jury, there was no finding of negligence on the part of Blakely

is without merit. The cause of action as alleged in Blakely's third-party complaint against the cattle company shows upon its face that under the provisions of section 21-446, supra, it cannot be maintained. The third-party complaint should have been dismissed on the motion of the cattle company . . ."

The jury in the instant case found against DePinto , and this court in 374 F2d 37, 44 held that the evidence was sufficient in finding DePinto guilty of negligence, and said:

"The jury could have found that DePinto's failure to make a reasonable investigation as to whether the ultimate plan would adversely affect United, his resignation from the board of directors in compliance with Kelly's request and without having made such an investigation, and his failure, as a member of the board of United, to fight for the best interests of United, considered together, constituted negligence and a breach of fiduciary duty and was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction.

We therefore conclude that the evidence was sufficient to warrant a jury finding against DePinto on the negligence, breach of fiduciary duty, and proximate cause issues raised by what DePinto states to be the controlling charges against him--those set forth in Counts VI and VII of the Doig complaint. It follows that the trial court did not err in denying the motions for a directed verdict, and for judgment notwithstanding the

verdict, made on the ground that the evidence was inadequate in this regard."

Therefore, the conclusion is compelling that since DePinto was guilty of negligence and a breach of a fiduciary duty, this issue is res judicata under Blakely Oil Company vs. Crowder, supra, and the trial court granting the motion for summary judgment on the basis of res judicata was correct, and the judgment should be affirmed as to all three of these appellees, Landoe, Sabo and Pegram.

B. The cross-claim failed to state a claim upon which relief can be granted against Landoe, Sabo and Pegram.

As stated above, the basic Arizona decision of Blakely Oil Company vs. Crowder 295 P2d 842, 843 establishes that in the absence of statute there is no right of indemnification between joint tortfeasors. Appellant, however, attempts to differentiate Busy Bee Buffet vs. Ferrell, 310 P2d 817, a case wherein the Supreme Court of Arizona held that there was such a thing as primary and secondary tort-liability under limited circumstances and that the secondary tortfeasor had a legitimate claim against the primary tortfeasor for indemnification. We submit, however, that the facts of the situation against Busy Bee Buffet vs. Ferrell certainly are different that the actual situation of the case of bar, different that Blakely Oil vs. Crowder, and is distinguished by a later Supreme Court case of Arizona not cited by appellant, but decided in 1967, being Thorton vs. Marisco, 425 P2d 869.

To understand Busy Bee in its proper perspective, you have to state the factual situation. The Buffet Company leased to one Pastis a res-

taurant building. The building had a trap door covering an opening leading into the basement. Pastis, the tenant in possession, left the trap door open, and the plaintiff, Ferrell, fell in the trap door. The Plaintiff, Ferrell, sued the Buffet and the Buffet cross-claimed against Pastis, the tenant, on the theory of the right of indemnification. Pastis was in control of the premises, Buffet was not. Pastis had left the trap door open, and the Buffet Company had no knowledge that the trap door was open. The court held that the light of these facts Pastis became primarily liable to Ferrell for the injuries he sustained, and Buffet was only secondarily liable. The court considered Blakely Oil Company vs. Crowder Cattle Company., Builders Supply Company vs. McCabe and Fidelity & Casualty Co., and cited from Fidelity & Casualty Co. of New York the same citation set forth on Page 16 of appellant's brief, but we call the court's attention to the last sentence of this citation from Fidelity as follows:

> "It does not mean that the joint tortfeasor whose negligence is the lesser can have indemnity from the other for damages caused by the concurring negligent act of both."

Considering whether in the case at bar DePinto is the lesser or greater tortfeasor under the last quoted differentiation is not important. The question is that he was a tortfeasor, and breached a duty, and that this was a proximate cause of damages suffered by United. This being the situation, he has no right of indemnification.

This is most clearly shown in the case of Thornton vs. Marsico, 425 P2d 869. This case is one in which the plaintiff, Marsico, brought an action against Thornton, a highway patrolman

and the State of Arizona, for injuries received while the highway patrolman was driving within the scope of his employment. Thornton, the patrolman, and the state cross-claimed against the contracting company that had built a detour and against Fidelity Deposit Company of Maryland as the company who had issued the bond for the Fisher Contracting Company. The cross-claim contended that Fisher had negligently constructed a detour, and that Thornton was only passively negligent in driving, and that therefore under Busy Bee they were entitled to indemnification from Fisher Contracting Company. The Fisher Contracting Company as third party defendant moved the court to dismiss the third party complaint for failure to state a claim. This motion was granted and an appeal taken. The court, in considering this, held that if both persons were negligent they were joint tortfeasors and stated on page 872 as follows:

> "The general rule which is followed in Arizona is that contribution is not allowed among joint tortfeasors. Blakely Oil, Inc. v. Crowder, 80 Ariz. 72, 292 P.2d 842 (1956); United States v. State of Arizona. 9 Cir., 214 F.2d 389 (1954) reh. den. 216 F.2d 248 (1954).
>
> (8) It is argued that Busy Bee Buffet v. Ferrell, supra, changed the general rule where one party is actively negligent and the other party is only passively negligent. We do not believe this to be so. What the Supreme Court of Arizona said was that when one was liable because of a duty imposed by law although he had not actively participated in the wrong which was the immediate cause of the injury, then that one had a right

to indemnity from the party who actively cause the injury. 7 Ariz. L Rev. 59, 69. This is an expansion of the law of indemnity and not an abrogation of the law of non-contribution among joint tort feasors. As the Supreme Court said in Busy Bee:

> "The term 'difference in kind and character' between the negligence of the Buffet and Pastis must not be confused with 'comparative negligence' or 'degrees of negligence.' "

When Thornton drove the patrol car he acted. This act excludes him from the category of "without personal fault" and therefore the third party plaintiffs do not come within the purview of Busy Bee Buffet v. Ferrell.

The granting of the motion to dismiss was proper as to count one."

This court in U. S. vs. State of Arizona et al, 214 F.2d 389 recognized and affirmed the Arizona law that there was no right of contribution by the joint tortfeasors. The U. S. brought a third party complaint against the State of Arizona after a judgment had been recovered against the U. S. from an unexploded bazooka shell injuring a young boy. A motion to dismiss the third party complaint was granted by the trial court and appealed to the Circuit Court of Appeals, Ninth Circuit, which affirmed the dismissal and stated on page 392:

> "We hold herein that the judgment of dismissal of the third party claim should be affirmed, and we do it upon the ground that the third party complaint failed to state a claim for the reason that in Arizona the law

> of the state, in the absence of a contract, in a case such as this, does not permit one tort-feasor to recover contribution from another tort- feasor liable for the same injury."

The Court went on further to state on page 393:

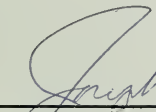
> "We hold that if a dismissal was proper on any ground, jurisdictional or failure to state a claim, the judgment should be affirmed here, irrespective of the nonassignment of grounds by the court or its assignment of the wrong ground. See Town of South Tucson v. Tucson Gas, Electric Light & Power Co., 9 Cir., 149 F.2d 847; Le Tulle v. Scofield, 308 U.S. 415, 60 S.Ct. 318, 84 L.Ed. 355. However, as shown above, Arizona did move to dismiss generally on the ground of failure to state a claim."

It follows then conclusively that since it has been adjudicated that DePinto breached his fiduciary duty and was guilty of gross negligence in relation to United in his capacity of director, that he was a primary, proximate cause tortfeasor. Being such, he has no right of indemnification and the Busy Bee case cannot be distorted to grant him a claim against these appellees, and the same ruling that was made in Thornton vs. Marsico, supra, should have been, and was made by the trial judge in this case, and should be affirmed.

This conclusion is most compelling as concerns Landoe for he was never a member of the board of United and never ratified and confirmed these acts while a member of American's board. This is coupled with the fact that he, as well as Sabo and Pegram, were not present in Phoenix

on the fateful day. They did not participate in any of the acts where the assets were transferred from United to Kelly. From this we contend that liability should not be imposed at all upon Landoe and if it were imposed on Sabo and Pegram they would at most qualify as secondary tort-feasors and would be entitled to endemnification from DePinto. However, Sabo and Pegram did not seek this relief and therefore, we submit, that once and for all this case should be laid at rest, the appeal denied, and the matter terminated.

Respectfully submitted,



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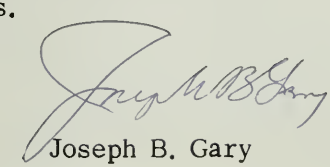
I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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Three true copies of the foregoing Brief of Appellees, Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram served, via First Class Airmail, postage prepaid, this 20 day of March, 1968, upon: above named attorneys